**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Implementation of Section 224 of the Act | ) | WC Docket No. 07-245 |
| | ) | |
| A National Broadband Plan for Our Future | ) | GN Docket No. 09-51 |

**ORDER**

**Adopted: June 1, 2011** **Released: June 1, 2011**

By the Chief, Wireline Competition Bureau:

## I. INTRODUCTION

1. In this Order we deny an Emergency Motion for Stay ("Stay Request") filed by American Electric Power Service Corporation, Duke Energy Corporation, Entergy Services, Inc., Florida Power & Light Company, Florida Public Utilities Company, Oncor Electric Delivery Company, LLC, Progress Energy, Inc., Southern Company, and Tampa Electric Company (collectively "Petitioners") of certain pole attachment rules.[1] In section 224 of the Communications Act of 1934, as amended (Act), Congress directed the Commission to "regulate the rates, terms, and conditions of pole attachments to provide that such rates, terms, and conditions are just and reasonable, and . . . adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions."[2] In an April 7, 2011, Report and Order and Order on Reconsideration, the Commission, among other things, adopted a new "just and reasonable" rate for pole attachments by telecommunications carriers (telecom rate formula).[3] On May 25, 2011, Petitioners filed a motion for stay of revised section 1.1409(e) of the Commission's rules incorporating the new telecom rate formula.[4] For the reasons discussed below, we deny the Stay Request.

## II. BACKGROUND

1. On May 20, 2010, the Commission issued the *Pole Attachment Order and Further Notice*.[5] Among other things, the *Further Notice* sought comment on ways to reduce the existing

[1] *See generally* Emergency Motion for Stay of American Electric Power Service Corporation, Duke Energy Corporation, Entergy Services, Inc., Florida Power & Light Company, Florida Public Utilities Company, Oncor Electric Delivery Company, LLC, Progress Energy, Inc., Southern Company, and Tampa Electric Company, WC Docket No. 07-245, GN Docket No. 09-51 (filed May 25, 2011) (Stay Request).

[2] 47 U.S.C. § 224(b)(1).

[3] *See generally Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, FCC 11-50 (rel. Apr. 7, 2011) (*2011 Pole Attachment Order*).

[4] *See generally* Stay Request.

[5] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864 (2010) (*2010 Order* or *Further Notice*).

disparities in pole rental rates and proposed to address those disparities by reinterpreting the telecom rate formula.[6]

2. In response to the record in that proceeding, on April 7, 2011, the Commission adopted the *2011 Pole Attachment Order*. Among other things, that *Order* "reinterpret[ed] the telecommunications rate formula for pole attachments consistent with the existing statutory framework, thereby reducing the disparity between current telecommunications and cable rates. Specifically, different interpretations of the term 'cost' in section 224(e) yield a range of rates from the existing fully allocated cost approach at the high end to a rate closer to incremental cost at the low end. Balancing the Commission's broadband goals with the interest in continued pole investment, [the *Order*] adopt[s] a definition of cost that yields a new 'just and reasonable' telecommunications rate."[7] The Commission concluded that the new telecom rate formula "strikes the right balance between promoting broadband and providing continued incentives for investment by pole owners consistent with section 224 of the Act."[8] The *2011 Pole Attachment Order* further found that "the new formula will minimize the difference in rental rates paid for attachments that are used to provide voice, data, and video services, and thus will help remove market distortions that affect attachers' deployment decisions. Removing these barriers to telecommunications and cable deployment will enable consumers to benefit through increased competition, affordability, and availability of advanced communications services, including broadband. Increasing competitive neutrality also improves the ability of different providers to compete with each other on an equal footing, better enabling efficient competition."[9]

3. On May 25, 2011, the Stay Request was filed by Petitioners. In the Stay Request, Petitioners ask the Commission to stay revised section 1.1409(e) of the Commission's rules, which specifies the new telecom rate formula.[10] Specifically, Petitioners state that they "filed a Petition for Review of the Order in the Court of Appeals for the District of Columbia on May 18, 2011, and intend to challenge revised Rule 1.1409(e), among other portions of the Order."[11] They request stay of revised section 1.1409(e) of the Commission's rules "pending final resolution of the petition for review (and any rehearing or petition for certiorari)."[12] Petitioners also request that the Commission rule on their Stay Request on or before June 1, 2011.[13]

## III. DISCUSSION

4. To qualify for the extraordinary remedy of a stay, a petitioner must show that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent a stay; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest would favor a grant of the stay.[14] Petitioners assert that the Commission may grant a stay even if they have not met all four criteria of this standard, so long as there is a particularly overwhelming showing with respect to at least one of the

[6] *Id.* at 11909–27, paras. 110–48.

[7] *2011 Pole Attachment Order*, FCC 11-50, at para. 8.

[8] *Id*. at para. 126.

[9] *Id*.

[10] Stay Request at 1.

[11] *Id*. at 2.

[12] *Id*. at 7-8.

[13] *Id*. at 8. Revised rule 1.1409(e) becomes effective on June 8, 2011.

[14] *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc*., 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*Virginia Petroleum Jobbers*).

criteria.[15] Here, however, we find that Petitioners have not met any of the four prongs. We therefore do not find any basis upon which to grant a stay of section 1.1409(e) of the Commission's rules, and we deny the Stay Request.

### A. Likelihood of Success on the Merits

5. Petitioners fail to show a likelihood of success on the merits. Petitioners claim that the new telecom rate formula reflected in revised section 1.1409(e) of the Commission's rules "is inconsistent with the language and intent of the Pole Attachments Act" based on arguments they made in the underlying proceeding.[16] However, the new telecom rate formula is consistent with the Act, as explained fully in the *2011 Pole Attachment Order*.[17] Nor did the Commission act in an arbitrary and capricious manner, as Petitioners contend.[18] Rather, the *2011 Pole Attachment Order* provided the rationale and reasoned justification for the adoption of the new telecom rate formula in detail based on the record in the proceeding.[19] We thus conclude that the Stay Request does not provide any basis for finding that Petitioners have a substantial likelihood of obtaining reversal or vacatur of the new telecom rate formula in revised section 1.1409(e) of the Commission's rules.

### B. Irreparable Harm

6. Petitioners also fail to demonstrate irreparable harm if the stay is not granted. In order to demonstrate "irreparable harm," the party must show that the alleged harm is "both certain and great; . . . actual and not theoretical. . . . Bare allegations of what is likely to occur" are not sufficient, because the test is whether the harm "will in fact occur."[20] Therefore, to demonstrate irreparable harm, Petitioners must provide "proof indicating that the harm is certain to occur in the near future."[21] Furthermore, an alleged injury is not "irreparable" if "adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation."[22] Consequently, economic loss "does not, in and of itself, constitute irreparable harm."[23]

7. We find that Petitioners have not shown that they would suffer irreparable harm in the absence of a stay because the harms they allege are either speculative, purely economic in nature, or insubstantial. Petitioners cite three main sources of alleged irreparable harm absent a stay. First, the Petitioners contend that lower pole rental rates paid by attachers pursuant to the new telecom rate formula[24] might not be offset by changes in Petitioners' rates for other services.[25] Second, Petitioners

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[15] Stay Request at 2-3.

[16] *Id*. at 3-4.

[17] *2011 Pole Attachment Order*, FCC 11-50, at paras. 155-71.

[18] Stay Request at 4.

[19] *See generally 2011 Pole Attachments Order*, FCC 11-50 at paras. 135-98.

[20] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (*Wisconsin Gas*).

[21] *Id*.

[22] *Sampson v. Murray,* 415 U.S. 61, 90 (1974) (quoting *Virginia Petroleum Jobbers,* 259 F.2d at 925).

[23] *Wisconsin Gas*, 758 F.2d at 674; *see also Virginia Petroleum Jobbers*, 259 F.2d at 925 ("[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough").

[24] To the extent that the Stay Request could be read to contend that lower pole rental payments, standing alone, constitute irreparable harm, we find instead that this would be economic loss that "does not, in and of itself, constitute irreparable harm." *Wisconsin Gas*, 758 F.2d at 674. We discuss below Petitioners' claims that there will be irreparable harm due to the lack of adequate compensatory or other corrective relief at a later date.

claim that when section 1.1409(e) takes effect, it "is likely to spawn numerous state court collection actions and Commission complaint proceedings, which will cost all stakeholders time and money" which "is not recoverable as an item of damages or 'refund' in the normal course."[26] Third, Petitioners assert that "the additional strain placed on the relationships between electric utility pole owners and attachers" is a source of irreparable harm.[27]

8. For one, Petitioners' claims are speculative because they have not demonstrated that the alleged harms "will in fact occur."[28] Petitioners do not demonstrate that regulators would lack the authority to appropriately adjust electric rates now or in the future, in which case reduced pole rental revenues would be mere economic loss. Rather, their concerns about the possible lack of revenue recovery through other rates are based on speculation about "the timing and process for cost recovery adjustments."[29] Similarly, their allegations of irreparable harm arising from the cost of "state court collection actions and Commission complaint proceedings," and of potential "strain" on relationships among attachers and pole owners,[30] are at most "[b]are allegations of what is likely to occur."[31]

9. Petitioners also have not demonstrated that any alleged harms are "great."[32] Because, as discussed above, the actual occurrence of any particular harm is speculative, the Petitioners likewise have not demonstrated that the magnitude of any losses would be substantial. The Petitioners' failure to demonstrate the significance of any alleged harm is exacerbated by their statement that "the impact of revised Rule 1.1409(e) is unlikely to motivate a rate change by itself."[33]

10. Finally, we observe that "[p]rivate negotiation is the preferred method for creating pole attachment arrangements and for dispute resolution."[34] In this regard, we observe that Petitioners' allegations regarding the possible uncertainty of revenue recovery through other rates and the potential for costly litigation fail to consider the potential that these could be mitigated through negotiations with attachers.[35] Such a cooperative approach not only would be consistent with the overarching framework

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[25] Stay Request at 4-5. In the alternative, Petitioners also claim that if they are able to increase other rates and the new telecom rate formula ultimately is rejected in court, electric ratepayers might continue to pay those higher rates. Stay Request at 5. Because that is an alleged harm to a third party, rather than to Petitioners, we consider it below. *See infra* Part III.C (Harm to Others and Public Interest Considerations). *See also WTVG, Inc. and WUPW Broadcasting, LLC*, CSR-7024-N, CSR-7853-N, Order, 25 FCC Rcd 12263, 12268, para. 12 (Med. Bur. 2010) ("In further support of its claim of irreparable harm, Buckeye points to, for example, the loss of duplicative network programming by some subscribers. Such losses, if any, can be expected to fall more heavily on the subscribers themselves than on Buckeye, and are more properly considered under the fourth factor.").

[26] Stay Request at 6.

[27] *Id*. at 6.

[28] *Wisconsin Gas*, 758 F.2d at 674.

[29] Stay Request at 5.

[30] *Id*. at 6.

[31] *Wisconsin Gas*, 758 F.2d at 674.

[32] *Id*.

[33] Stay Request at 5 n.13.

[34] *Mile Hi Cable Partners et al. v. Public Service Company of Colorado*, File No. PA 98-003, Memorandum Opinion and Order, 14 FCC Rcd 3244, 3247, para. 8 (1999) (citing *Report and Order, Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, 13 FCC Rcd 6777, paras. 10-21 (1998) (*Telecom Order*)).

[35] *See, e.g.*, *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and To Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals*

for pole attachments,[36] but could minimize the extent to which implementation of new rates theoretically could lead to "[b]ad relationships" among attachers and pole owners.[37] The failure to account for this alternative renders Petitioners' claims all the more speculative both in terms of their likelihood and their magnitude.

### C. Harm to Others and Public Interest Considerations

11. The additional factors in the four-part standard likewise are not met. Petitioners claim that revised rule 1.1409(e) will cause "turmoil" in the industry without any associated benefit to new broadband deployment, while the harm to attachers from granting a stay is "*de minimis*."[38] To the extent that the "turmoil" involves the Petitioners' claims of irreparable harm to themselves or harm to electric ratepayers,[39] we find those assertions fundamentally speculative for the same reasons discussed above.[40]

12. Moreover, Petitioners' claim that there are no "'shovel-ready' broadband projects" that would result in incremental broadband deployment absent a stay reflects a fundamental misunderstanding of the rationale for the new telecom rate formula.[41] Even assuming *arguendo* that the Petitioners' claim is correct, increased deployment of broadband networks was only one aspect of the Commission's policy analysis. Importantly, the Commission found that reducing the telecom rate to be lower and closer to uniform with the cable rate "will better enable providers to compete on a level playing field, will eliminate distortions in end-user choices between technologies, and lead to provider behavior being driven more by underlying economic costs than arbitrary price differentials."[42] Thus, the Commission recognized the effects the disparate telecom and cable rates had on cable operators' incentives to use their

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*As Requiring A Variance*, WT Docket No. 08-165, Order, 25 FCC Rcd 1215, 1220, para. 10 (Wir. Tel. Bur. 2010) (finding no showing of irreparable harm where the parties requesting a stay could mitigate possible harms through agreements reached with other interested parties and that "Petitioners' argument thus essentially reduces to speculation that their members will incur costs of litigation (which are not the sort of harm that can support a stay) where" they cannot reach such agreements).

[36] Indeed, even in some situations where a pole owner had unilaterally imposed a pole rental rate higher than the applicable formula, the Commission has relied in the first instance on negotiations between the parties. *See, e.g.*, *City of Dublin, GA v. Georgia Power*, File No. PA 00-008, Order Granting Temporary Stay, 16 FCC Rcd 20421, 20423, para. 6 (Cab. Serv. Bur. 2001) (holding in abeyance a request to stay an annual per pole rate increase from $5.83 to $53.35 per pole and instead directing the parties to attempt to negotiate a resolution to the dispute); *Knology v. Georgia Power*, File No. PA 00-007, Order Granting Temporary Stay, 16 FCC Rcd 20413, 20415, para. 6 (Cab. Serv. Bur. 2001) (holding in abeyance a request to stay an annual per pole rate increase from approximately $5.00 to $53.35 per pole and instead directing the parties to attempt to negotiate a resolution to the dispute).

[37] *See* Stay Request at 6. We also note that in the record of the underlying proceeding, attachers broadly supported the adoption of new pole rental rates that were lower and closer to uniform, *see generally 2011 Pole Attachment Order*, FCC 11-50 at paras. 135-98, without expressing countervailing concerns about the effects on their relationships with pole owners (whose actions also remain subject to regulatory oversight in many other respects).

[38] Stay Request at 6-7.

[39] As noted above, building on their allegations of irreparable harm, Petitioners also assert, alternatively, that if they are able to increase other rates and the new telecom rate formula ultimately is rejected in court, electric ratepayers' rates might continue to pay those higher rates. *Id*. at 5. In addition to finding these claims speculative, we observe that these same electric ratepayers also stand to benefit from reductions in excessive costs of providing broadband and other communications services. *2011 Pole Attachment Order*, FCC 11-50 at para. 147 n.443.

[40] *See supra* Part III.A.

[41] Stay Request at 7.

[42] *2011 Pole Attachment Order*, FCC 11-50 at para. 147.

existing networks to provide new, advanced services, some of which potentially could be classified as telecommunications services.[43]

13. Further, the Stay Request itself suggests that grant of a stay likely would result in harm to some attachers. The Stay Request observes that some "contractual arrangements . . . simply incorporate by reference the extant Commission telecom formula."[44] Thus, notwithstanding the Petitioners' general protestations regarding the implementation of the new telecom rate formula, even they acknowledge that the new telecom rate formula would benefit attachers currently under those types of agreements which, by their terms, would apply the new telecom rate formula as soon as it became effective. Conversely, then, granting a stay would deny those attachers the benefit of the lower rate, and could factor into their decisions whether to offer new, advanced services. This, in turn, has the potential to deny customers the benefits of new advanced services and competition. In sum, we find that the Petitioners have not demonstrated that the balance of equities warrants a stay.

## IV. ORDERING CLAUSE

14. Accordingly, IT IS ORDERED that, pursuant to the authority of sections 1, 4(i), and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and section 1.43 of the Commission's rules, 47 C.F.R. § 1.43, the Emergency Motion for Stay of American Electric Power Service Corporation, Duke Energy Corporation, Entergy Services, Inc., Florida Power & Light Company, Florida Public Utilities Company, Oncor Electric Delivery Company, LLC, Progress Energy, Inc., Southern Company, and Tampa Electric Company IS DENIED.

15. This action is taken under delegated authority pursuant to sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291.

FEDERAL COMMUNICATIONS COMMISSION

Sharon E. Gillett
Chief, Wireline Competition Bureau

[43] *See, e.g.*, *2011 Pole Attachment Order*, FCC 11-50 at para. 134.

[44] Stay Request at 6.